

No. 15628

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAM SNYDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

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BRIEF FOR THE APPELLEE.

Opinion Below.

The findings of fact and conclusions of law of the District Court [R. 12a-16] are not officially reported.

Jurisdiction.

This is a suit seeking interest on overpayments for 1943 which were credited to an unpaid assessment for 1945. [R. 3, 14-15.] A part of the tax for 1943 was paid in installments in 1948 and 1949. [R. 14.] These amounts were declared overpayments in 1955. [R. 13-14.] On December 6, 1955, a portion of these overpayments was credited against the unpaid assessment for 1945. [R. 15.] This suit was initiated in the court below on April 23,

1957. [R. 8.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1346(a)(2). A summary judgment dismissing the complaint was entered on May 28, 1957. [R. 17.] Within sixty days, and on June 12, 1957, a notice of appeal was filed by taxpayer. [R. 17.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Whether the District Court correctly decided that under Section 3771(b)(1), Internal Revenue Code of 1939 no interest was allowable on the overpayments for 1943 which were credited to the unpaid assessment for 1945 since the date of the assessment for 1945 preceded the dates of the overpayments for 1943.

Statutes Involved.

The applicable statutes may be found in the Appendix, *infra*.

Statement.

The facts as found by the District Court are as follows [R. 13-15]:

On or before March 15, 1946, taxpayer filed his individual federal income tax return for the year 1945 with the Collector of Internal Revenue for the Sixth District of California and paid the taxes shown thereon to be due in the sum of \$4,300.69. [R. 13.]

On March 15, 1948, there was assessed against the taxpayer a deficiency in income tax for the year 1945 in the sum of \$11,803.51 plus interest in the sum of \$1,363.22 computed to February 18, 1948. On March 23, 1948, the taxpayer was served with a Form 17, notice

and demand to pay the assessment, but did not do so within ten days. [R. 13.]

On March 29, 1955, there was entered in this Court in favor of the taxpayer and against Harry C. Westover, a former Collector of Internal Revenue, in Docket No. 13521-Y, a judgment decreeing an overpayment of income taxes for the years 1943, 1944 and 1946 together with interest as provided by law. A certificate of probable cause was included in the judgment. [R. 13-14.]

With respect to the year 1943 the judgment set forth the following overpayments with the dates of payment as follows [R. 14]:

\$1,700.00—May 6, 1948
\$1,454.58—August 9, 1948
\$1,700.00—September 9, 1948
\$1,700.00—October 8, 1948
\$1,700.00—November 6, 1948
\$ 781.83—December 6, 1948
\$1,700.00—January 13, 1949
\$1,700.00—February 14, 1949
\$ 243.19—March 14, 1949

On March 30, 1955, taxpayer filed with the Commissioner of Internal Revenue a judgment claim for refund based on the judgment. [R. 14.]

Thereupon, the Commissioner issued a Notice of Adjustment, Form 1331-B, advising the taxpayer that a portion of the adjudged overpayment of taxes had been credited to the unpaid balance of the outstanding assessment for the year 1945. The remaining overpayments together with interest to November 8, 1955, a date preceding the date of the refund check by not more than thirty days were refunded to the taxpayer. [R. 14.]

On December 6, 1955, the District Director of Internal Revenue signed the schedule containing the overassessment whereby there was credited out of the overpayments for the year 1943 \$7,419.14 toward the balance of unpaid assessed tax for 1945, and \$4,161.21 toward interest accruing thereon from the date of the assessment, March 15, 1948, to December 6, 1955. [R. 15.]

The date of the assessment, March 15, 1948, of the 1945 tax liability preceded the dates of the payments made on the tax liability for the year 1943 as set forth above. No interest was allowed on the overpayments credited to the assessed tax. Interest was allowed on the overpayments credited to the interest accrued on the unpaid assessment from the dates of payment to December 6, 1955. [R. 15.]

The District Court held that the District Director properly credited the adjudged overpayments for 1943 to the unpaid assessment for 1945 and that no interest was allowable on the overpayments credited since the date of the 1945 assessment preceded the dates of the 1943 overpayments. [R. 15-16.]

Summary of Argument.

Interest is allowable against the United States only when specifically provided for by law. Section 3771(a) applies to any case of interest upon an overpayment. Section 3771(b)(1) applies to any case of crediting an overpayment and allows interest upon the overpayment from the date of the overpayment to the date of the

additional assessment to which the overpayment is credited. In any case of an overpayment, a credit against the amounts due by taxpayer is proper before any refund is made. The overpayments here for 1943, therefore, were properly credited to the unpaid additional assessment for 1945. Consequently, interest was not allowable on the 1943 overpayments credited because the overpayment dates were subsequent to the 1945 assessment date. Section 2411(a), 28 U. S. C., provides only for interest on an overpayment which is refunded. It does not purport to provide for interest where a credit is made; the section is applicable only where the overpayment is refunded.

Plainly Congress has not attempted to equalize interest in the event of indebtedness on the part of both the Government and the taxpayer. The effect of the provisions may be disadvantageous to the Government as well as to the taxpayer. There is no basis, therefore, for a claim of injustice.

Taxpayer's claim that no summary judgment could be entered here is without merit because the facts material to this suit are shown by the documents in the record and there is no controversy with respect to those facts.

Accordingly, the District Court correctly held that no interest was allowable on the 1943 overpayment credited to the 1945 assessment because the 1945 assessment date preceded the 1943 overpayment dates. In addition, the motion for summary judgment was properly granted.

ARGUMENT.

The District Court Correctly Decided That Under Section 3771(b)(1), Internal Revenue Code of 1939, No Interest Was Allowable on the 1943 Overpayments Credited to the 1945 Assessment Because the 1945 Assessment Date Preceded the 1943 Overpayment Dates.

Interest is allowable against the United States only when specifically provided for by law. *Angarica v. Bayard*, 127 U. S. 251, 260; *United States v. Goltra*, 312 U. S. 203, 207. The Internal Revenue Code provides for interest “upon *any* overpayment” (italics added), but a clear distinction is made between the instance of crediting an overpayment, and the instance of refunding an overpayment. A different rule for computing interest applies in each instance. Section 3771, Internal Revenue Code of 1939 (Appendix, *infra*). In providing for interest upon *any overpayment*, when an overpayment is credited against an additional assessment, as here, interest is allowed from the date of the overpayment to the date of the additional assessment. Section 3771(b)(1). Whenever there is an overpayment, it must first be credited against taxes due from taxpayer before any refund is made. Section 6402(a), Internal Revenue Code of 1954¹ (Appendix, *infra*). There is no question that

¹Section 6402(a) is substantially the same as Section 322(a)(1), Internal Revenue Code of 1939 (26 U. S. C. 1952 ed., Sec. 322) which provides:

(a) *Authorization.*

(1) *Overpayment*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

the requirement of crediting is mandatory (*York Safe & Lock Co. v. United States*, 40 F. 2d 148 (C. Cls.), certiorari denied, 282 U. S. 839; *Standard Oil Co. v. United States*, 5 F. Supp. 976 (C. Cls.), certiorari denied, 293 U. S. 599; *United States ex rel. Cole v. Helvering*, 73 F. 2d 852 (C. A. D. C.); *Blair v. United States ex rel. Union Pac. R. Co.*, 6 F. 2d 484 (C. A. D. C.)), although taxpayer apparently argues to the contrary. (See Br. 13-15.) And, the requirement of crediting is not vitiated, as taxpayer argues (Br. 9-11), because the overpayment is adjudged rather than determined by the Commissioner. *United States ex rel. Cole v. Helvering*, *supra*; *Blair v. United States ex rel. Union Pac. R. Co.*, *supra*. See, also, *Tull & Gibbs, Inc. v. United States*, 48 F. 2d 148, 150 (C. A. 9th); *Noyes v. United States*, 55 F. 2d 870, 872 (C. A. 9th). In *Blair v. United States ex rel. Union Pac. R. Co.*, *supra*, p. 486, the court stated:

"The section accordingly should receive a liberal construction, in order to give effect to the manifest legislative intent, and in this view there is no reason to deny it application where such an overpayment has been reduced to judgment. In this instance that action was made necessary by a mistaken ruling of the department, not by any default of the taxpayer, and the latter should not be penalized because of it. It is true that section 252 does not specify judgments *eo nomine* as entitled to be credited upon later assessments, but extends that right to amounts which,

No change in the law was intended by Section 6402(a) except to permit expressly the crediting of interest on an overpayment against any outstanding liability for any tax. H. Rep. No. 1337, 83d Cong., 2d Sess., p. A412 (3 U. S. C. Cong. & Adm. News (1954) 4017, 4559); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 581 (3 U. S. C. Cong. & Adm. News (1954) 4621, 5230). In fact, Section 6402(a), Internal Revenue Code of 1954 consolidates Sections 322(a)(1) and 3770(a)(4), Internal Revenue Code of 1939.

upon an examination of any return, appear to be in excess of that properly due. The present claim is of such a character, as is evidenced by the judgment of the court. The judgment did not create the claim, nor change its character; it was, and it remained, a claim for an amount of income tax 'paid in excess of that properly due.' The character of the claim and not its form, should control."

* * * * *

"Moreover, the contention of the respondent tends to deprive section 252 of any force or effect whatsoever; for section 3220 authorizes the Commissioner of Internal Revenue to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected, as well as to repay to any collector such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him. These provisions apply, not only to judgments, but to all other claims for overpayments of income taxes, and if it be held that they shall control over those in section 252 nothing will remain for the latter section to operate upon."

* * * * *

"The duty imposed upon the respondent, according to the conceded facts in the case, was mandatory, not discretionary; the language of the statute is 'the amount of the excess shall be credited'; the courts therefore have jurisdiction to determine the correct construction of the statute and to compel the respondent to proceed accordingly."

The crediting here, therefore, complied with the mandate of Congress. Consequently, as Section 3771(b)(1) makes crystal clear, interest is allowed only from the date

of the overpayment to the date of the assessment to which the overpayment is credited. As applied to this case, the result is that no interest is allowable on the overpayments credited to the unpaid assessment,² as the District Court held, because the dates of the overpayments, from May-November, 1948 [R. 8], were subsequent to the 1945 assessment date of March 15, 1948. [R. 13.]

As taxpayer admits, interest is payable on overpayments and not on judgments. (Br. 7.) Section 2411(a), 28 U. S. C. (Appendix, *infra*), provides only for interest on overpayments refunded. That section provides for interest at the rate of six percent per annum from the date of the payment to a date not exceeding 30 days from the date of the refund. Substantially the same provision is found in Section 3771(b)(2), Internal Revenue Code of 1939. Obviously Section 3771(b)(2) is not applicable where Section 3771(b)(1) applies because a credit and not a refund is made. Section 2411(a), 28 U. S. C., does not purport to provide for interest where a credit is made. That section is applicable only where the overpayment is refunded.³

²In this connection, it may be pointed out that interest was allowed on the overpayments credited to the interest accrued on the unpaid assessment. Interest was allowed from the dates of payment to December 6, 1955, which was the date of the credit.

³Section 3773, Internal Revenue Code of 1939 (Appendix, *infra*) contains the reference to the Judicial Code and was re-enacted as Section 6612, Internal Revenue Code of 1954. As the Committee Report to the Internal Revenue Code of 1954 states, the section "contains references to general provisions of law relating to interest on judgments for overpayments and to restrictions on interest." S. Rep. No. 1622, *supra*, p. 590 (3 U. S. C. Cong. & Adm. News (1954) 4621, 5239). Section 6612 provides as follows:

Sec. 6612. Cross References.

(a) *Interest on Judgments for Overpayments.*—

For interest on judgments for overpayments, see 28 U. S. C. 2411(a).

Moreover, the judgment stated “together with interest on said sum as provided by law * * *.” [R. 4.] The judgment requires interest only as the law provides which here, we submit, is as allowed under Section 3771(b)(1), as demonstrated above, and not, as taxpayer argues, on all of the overpayments from the date of payment to December 6, 1955, as if all of the amounts were refunded.⁴ (Br. 15.)

Taxpayer argues that it was not the intent of Congress to charge a taxpayer with interest on an assessment but to deny him any interest for the same period on an overpayment credited to the assessment. (Br. 11-12.) This equitable argument has been rejected in many cases whether made by the Government or a taxpayer. *Virginia Electric & Power Co. v. United States*, 126 F. Supp. 178 (C. Cls.); *Dewey Portland Cement Co. v. United States*, 128 F. Supp. 385 (C. Cls.); *Ash Grove Lime & Portland Cement*

(b) *Adjustments.*—

For provisions prohibiting interest on certain adjustments in tax, see section 6413(a).

(c) *Other Restrictions on Interest.*—

For other restrictions on interest, see section 2011(c) (relating to refunds due to credit for state taxes), 2014(e) (relating to refunds attributable to foreign tax credits), 6412 (relating to floor stock refunds), 6413(d) (relating to taxes under the Federal Unemployment Tax Act), 6416 (relating to certain taxes on sales and services), and 6419 (relating to the excise tax on wagering).

(26 U. S. C. 1952 ed., Supp. II, Sec. 6612.)

⁴Even if the judgment called for interest not provided for by law, it would not be sufficient authority for the Commissioner to pay. See *Angarica v. Bayard*, *supra*; *United States v. Goltra*, *supra*; and Sol. Op. 143, I-2 Cum. Bull. 261 (1922).

Co. v. United States, 128 F. Supp. 387 (C. Cls.); *Abney Mills v. United States*, 130 F. Supp. 353 (C. Cls.); *Babcock & Wilcox Co. v. Pedrick*, 212 F. 2d 645 (C. A. 2d), cer. den., 348 U. S. 936; *Tull & Gibbs, Inc. v. United States*, *supra*; *Noyes v. United States*, *supra*; *Pan American World Airways, Inc. v. United States*, 119 F. Supp. 144 (S. D. N. Y.); *Max Factor & Co. v. United States* (S. D. Calif), decided January 25, 1951 (43 A. F. T. R. 740) (51-1 U. S. T. C. par. 9195). Cf. *United States v. Koppers Co.*, 348 U. S. 254; *Manning v. Seeley Tube & Box Co.*, 338 U. S. 561. Interest is imposed on a deficiency from the date the tax was due to the date the deficiency is assessed. Section 292(a), Internal Revenue Code of 1939 (Appendix, *infra*). Interest on an additional assessment is imposed on the unpaid amount from the date of notice and demand until paid. Section 294(b), Internal Revenue Code of 1939 (Appendix, *infra*). Interest on an overpayment is allowed, in the case of a credit, from the date of the overpayment to the date of the additional assessment to which the credit is taken. Section 3771(b)(1). The effect of the provisions may be disadvantageous to taxpayer, as here, just as the effect may be disadvantageous to the Government. For example, it has been held repeatedly that an overassessment continues to bear interest even though it is offset by an unassessed deficiency upon which interest has ceased to accrue from the filing of a waiver. *Virginia Electric & Power Co. v. United States*, *supra*; see Rev. Rul. 55-485, 1955-2 Cum. Bull. 499, as modified by Rev. Rul. 56-573, 1956-2 Cum.

Bull. 955. The principle that interest upon offsetting overpayments and deficiencies must be separately computed without regard to mutual cancellation of claims is also held. *Babcock & Wilcox Co. v. Pedrick, supra*.

Taxpayer also complains that no summary judgment could be entered here because a material issue of fact remains. This fact, taxpayer says, is that the prior judgment ordered a refund. (Br. 16.) All of the allegations in taxpayer's complaint were admitted in the Answer. [R. 9.] Taxpayer did not object to the affidavit submitted with the motion for summary judgment. These documents show the facts material to this suit and there is no controversy with respect to these facts. Judge Yankwich who decided the instant case also entered the judgment in question. No reason appears, therefore, to prevent a summary judgment. In any event, even if the prior judgment referred to a refund, it could not affect the proper allowance of interest where a credit has been made. Section 6402(a), Internal Revenue Code of 1954; *Angarica v. Bayard, supra*; see footnote 4, *supra*. The fact that the judgment referred to a refund, therefore, is inconsequential.

Conclusion.

The District Court correctly held that no interest was allowable on the 1943 overpayments credited to the 1945 assessment because the 1945 assessment date preceded the 1943 overpayment dates. The motion for summary judgment was properly granted and the judgment should be affirmed.

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APPENDIX.

Internal Revenue Code of 1939:

SEC. 292 [As amended by Sec. 2, Act of December 17, 1943, c. 346, 57 Stat. 601]. INTEREST ON DEFICIENCIES.

(a) *General Rule.*—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 292.)

SEC. 294. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

* * * * *

(b) *Deficiency.*—Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, or under section 293, or any addition to the tax in case of delinquency provided for in section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid. If any part of a deficiency prorated to any unpaid installment under sec-

tion 272(i) is not paid in full on or before the date prescribed for the payment of such installment, there shall be collected as part of the tax interest upon the unpaid amount at the rate of 6 per centum per annum from such date until it is paid.

* * * * *

(26 U. S. C. 1952 ed., Sec. 294.)

SEC. 3771. INTEREST ON OVERPAYMENTS.

(a) *Rate*.—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

(b) *Period*.—Such interest shall be allowed and paid as follows:

(1) *Credits*.—In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment of a tax imposed by the Revenue Act of 1921, 42 Stat. 227, or any subsequent Revenue Act, then to the date of the assessment of that amount.

(2) *Refunds*.—In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon.

(c) *Additional Assessment Defined*.—As used in this section the term 'additional assessment' means a further assessment for a tax of the same character

previously paid in part, and includes the assessment of a deficiency of any income or estate tax imposed by the Revenue Act of 1924, 43 Stat. 253, or by any subsequent Revenue Act.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3771.)

SEC. 3773. INTEREST ON JUDGMENTS.

For interest on judgments, section 177, of the Judicial Code as amended by act of May 29, 1928, ch. 852, §615, 45 Stat. 877 (U. S. C., Title 28, §284).

(26 U. S. C. 1952 ed., Sec. 3773.)

Internal Revenue Code of 1954:

SEC. 6402. AUTHORITY TO MAKE CREDITS OR REFUNDS.

(a) *General Rule.*—In the case of any overpayment, the Secretary or his delegate, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall refund any balance to such person.

* * * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 6402.)

28 U. S. C.:

SEC. 2411 [As amended by Sec. 120, Act of May 24, 1949, c. 139, 63 Stat. 89]. INTEREST.

(a) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of

any internal-revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

* * * * *